

Warning!: Self-Help and the Presidency

William P. Marshall

It may be hard to look over the current political landscape without concluding that some remedy for the current political dysfunction is in order.¹ We live in a time when political polarization is so intense that some members of one party have openly stated that they would do virtually anything to block the agenda of the sitting President² – up to and including opposing members of their own caucus who suggest that some compromises with the other side might be in order.³ These politicians have lived up to their words. The President's agenda in Congress has been stalled, and many of the serious problems facing the nation remain unanswered.⁴

The President has not stayed on the sidelines while his opponents have

1. See generally Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 273-75 (2011) (describing the current dysfunctional state of American politics). But see Michael W. McConnell, *Moderation and Coherence in American Democracy*, 99 CALIF. L. REV. 373 (2011) (arguing that the nation's politics are not dysfunctional). A recent Pew Research Center poll illustrates the degree of partisan antipathy that has overtaken the country. PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (2014) (finding that 27% of Democrats and 36% of Republicans believe that the opposing party presents a threat to the nation's well-being).
2. See ROBERT DRAPER, DO NOT ASK WHAT GOOD WE DO: INSIDE THE U.S. HOUSE OF REPRESENTATIVES xv-xix (2012) (quoting Republican Rep. Kevin McCarthy as saying, "We've gotta challenge [Democrats] on every single bill," and noting that top House Republicans met the night of President Obama's inauguration to devise a plan to "mortally wound" President Obama through "united and unyielding opposition"); see also John Harwood, *With Victory, Republicans Would Face Uncertainty*, N.Y. TIMES, Oct. 31, 2010, <http://www.nytimes.com/2010/11/01/us/politics/01caucus.html> [perma.cc/RLQ8-AJCL] (quoting Senate Republican leader Mitch McConnell in an interview with *National Journal* as saying, "The single most important thing we want to achieve is for President Obama to be a one-term president").
3. See Lisa Mascaro & Michael A. Memoli, *Eric Cantor's Loss Highlights GOP Divisions, Suggests More Gridlock*, L.A. TIMES, June 11, 2014, <http://www.latimes.com/nation/la-na-congress-fallout-20140612-story.html> [http://perma.cc/5ZJS-KP7J] (suggesting Eric Cantor's 2014 primary loss might have been the result of his perceived willingness to compromise with Democrats on immigration reform, among other issues).
4. See generally Jon Terbush, *Confirmed: This Is the Worst Congress Ever*, WEEK, Dec. 26, 2013, <http://theweek.com/article/index/254566/confirmed-this-is-the-worst-congress-ever> [http://perma.cc/TXB2-G5ND] (noting that out of the sixty-six bills passed by Congress in 2013 – the lowest number in four decades – only fifty-eight became law).

done all they can to make his presidency fail.⁵ Rather, he has engaged in a series of unilateral actions across a range of spectrums in an attempt to circumvent the political roadblocks placed before him—a strategy that he coined “We Can’t Wait.”⁶ These actions have included, among others, an aggressive use of the recess appointment power,⁷ selective enforcement of certain statutory provisions such as those in the Affordable Care Act⁸ and the Immigration and Nationality Act,⁹ and the use of signing statements,¹⁰ rather than the veto, to signal that the President would not comply with what he believed to be constitutionally objectionable limitations imposed on his

-
5. See, e.g., John Frank & Caitlin Owens, *Obama Focuses on Economy in NC State, Vows ‘Year of Action’ on Jobs*, NEWS & OBSERVER, Jan. 15, 2014, http://www.newsobserver.com/2014/01/15/3534924_obama-focuses-on-economy-in-nc.html [<http://perma.cc/G4VB-5382>] (quoting President Obama as saying, “Where I can act, on my own without Congress, I’m going to do so”).
 6. See, e.g., Press Release, White House, Remarks by the President on the Economy and Housing (Oct. 24, 2011), <http://www.whitehouse.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing> [<http://perma.cc/925K-97CP>] (“[W]e can’t wait for an increasingly dysfunctional Congress to do its job. Where they won’t act, I will.”); Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 22, 2012, <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html> [perma.cc/7SWQ-VNZ2] (tracing the origins of the “We Can’t Wait” agenda to the fall of 2011 and arguing President Obama chose the label in preparation “to more aggressively use executive power to govern in the face of Congressional obstructionism”).
 7. See Press Release, White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts> [<http://perma.cc/DR3E-2J89>].
 8. Mark J. Mazur, U.S. Dep’t of the Treasury, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, TREASURY NOTES BLOG (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx> [<http://perma.cc/5X7W-7998>].
 9. See Press Release, Dep’t of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), <https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low> [<http://perma.cc/G6XH-NGH3>].
 10. See, e.g., Press Release, White House, Statement by the President on H.R. 3304 (Dec. 26, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304> [<http://perma.cc/EK59-MEFA>] (stating that the restrictions on the transfer of Guantanamo detainees in Sections 1034 and 1035 of the National Defense Authorization Act violated constitutional separation of powers principles and would only be implemented in a “manner that avoids the constitutional conflict”). The Obama Administration later chose to ignore those provisions when it failed to notify Congress in advance of the prisoner exchange involving Sergeant Bowe Bergdahl. Jess Bravin, *Bowe Bergdahl Swap Took Place in Legal Gray Area*, WALL ST. J., June 4, 2014, <http://online.wsj.com/articles/bowe-bergdahl-swap-took-place-in-legal-gray-area-1401924827> [<http://perma.cc/A822-6U4E>].

authority by the Congress.

Not surprisingly, many of the President's opponents (and at times some of his defenders¹¹) have claimed that such uses of unilateral executive branch power violate constitutional boundaries.¹² The Obama Administration, in turn, has staunchly defended its actions as constitutionally permissible, and in so doing has relied on the traditional lines of legal authority pertaining to the scope of presidential power.¹³ This has not been an easy task. The Court's recent decision in *NLRB v. Noel Canning*,¹⁴ invalidating the President's expansive use of his recess appointment authority,¹⁵ is but one example in which an attempt to defend the President's actions on traditional legal grounds has not proved successful.

David Pozen would make the job of an Obama Administration lawyer a whole lot easier. In *Self-Help and the Separation of Powers* ("Self-Help"),¹⁶ Pozen argues that, when Congress acts wrongly, the President may permissibly take actions that are outside her normal constitutional bounds.¹⁷ This means, according to Pozen, that the President, in addition to possessing her other powers, may enjoy the remedy of self-help as a legitimate response to congressional obstreperousness.¹⁸ An Administration lawyer could therefore,

-
11. Elahe Izadi, *Dianne Feinstein Disappointed Lawmakers Not Given 30-Day Notice on Bergdahl Swap*, NAT'L J. DAILY, June 3, 2014, <http://www.nationaljournal.com/congress/dianne-feinstein-disappointed-lawmakers-not-given-30-day-notice-on-bergdahl-swap-20140603> [<http://perma.cc/3VHR-CLEH>] (quoting Senate Intelligence Committee Chairwoman Dianne Feinstein as saying President Obama's failure to notify lawmakers of the swap was "very disappointing," and "the White House is pretty unilateral about what they want to do when they want to do it").
 12. See, e.g., Susan Davis, *Boehner to Sue Obama Over Executive Authority*, USA TODAY, June 26, 2014, <http://www.usatoday.com/story/news/politics/2014/06/25/boehner-suing-obama/11355639> [<http://perma.cc/Y629-4DKK>] (discussing Boehner's intentions to sue "over the scope of the administration's executive authority").
 13. E.g., *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1, 2012 WL 168645, at *4 (Jan. 6, 2012) (arguing that President Obama's controversial recess appointments in January 2012 to top posts at the Consumer Financial Protection Bureau and the National Labor Relations Board were lawful under "the traditional understanding that the Recess Appointment Clause is to be given a practical construction").
 14. 134 S. Ct. 2550 (2014).
 15. *Id.* at 2578.
 16. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014).
 17. *Id.* at 17-18. Pozen's thesis is somewhat broader than this presentation, in that he argues that any branch of government might have the tool of self-help available when a coordinate branch acts illegitimately. This essay is primarily concerned with the implications of *Self-Help* for presidential power, although Part III briefly addresses some of the concerns with the remedy of self-help as it is available more generally.
 18. *Id.* at 39-48.

under Pozen's theory, defend a President's otherwise "extra-legal"¹⁹ actions as a permissible response to an asserted "failure of congressional lawmaking"²⁰ without having to point to any direct constitutional allocation of authority to the executive branch.²¹

When I first read an early draft of *Self-Help*, I told the author that I believed it to be one of the most brilliant and innovative pieces of law review scholarship that I had ever encountered. I also told him that I thought it was possibly one of the most dangerous. The last thing American constitutional law needs is another rationale that could be used to justify an expansive exercise of executive branch power, particularly when that exercise is based on little more than a President's own conclusion that Congress has somehow engaged in constitutional wrongdoing when it aggressively seeks to frustrate her agenda.²²

The final version of *Self-Help* confirmed my earlier convictions. The Article is wonderfully accomplished and is a testament to Pozen's skills as a legal scholar. At the same time, however, the thesis advanced in *Self-Help* remains alarming. The modern presidency has already (and long since) ascended to the role of the most dangerous branch.²³ Allocating to the presidency the additional tool of self-help along with its already formidable arsenal would only exacerbate the considerable imbalance among the branches that already exists.²⁴

This essay is an effort to respond to some of the concerns raised by Pozen's remarkable thesis. Part I questions the central predicate offered by Pozen as justification for a President's self-help powers—that congressional obstruction

19. Unless otherwise indicated, I use the term "extra-legal" to mean outside the bounds of both the large-C (formal legal) and small-c (constitutional conventions) restraints that Pozen identifies as constraining Congress and the President. *See id.* at 10 (citing Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082-83 (2013)).

20. *Id.* at 78.

21. Pozen argues that congressional wrongdoing should not give the President a carte blanche in how she elects to respond. Rather, the range of permissible options is limited by principles of proportionality. Pozen states, for example, that while the President (or Congress) could violate a large-C constraint in response to another branch's engaging in a large-C constitutional violation, she could not do so in response to a small-c infraction and so, in the latter instance, would be limited to a small-c response. *Id.* at 66-67.

22. As Pozen explains: "In taking it upon themselves to rectify the misdeeds of others, self-helpers effectively act as judges of their own cause." *Id.* at 50.

23. *E.g.*, BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 6 (2010); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727 (1996); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507 (2008).

24. See *infra* notes 60-69 and accompanying text.

is equivalent to constitutional malfeasance.²⁵ Part II raises my central policy objection: even if one accepts Pozen's assertion that a particular Congress's efforts to obstruct a President's agenda can, in certain circumstances, be construed as constitutionally improper, the self-help remedy is too extensive an addition to the President's already formidable array of constitutional authority. Part II.A explains why, although self-help may nominally be available to both the President and the Congress, the President is in the far better position to take effective advantage of the remedy. Part II.B sets forth some of the specific dangers inherent in investing the President with the self-help power. Part III then examines the self-help thesis from a different angle, addressing some of the jurisprudential concerns present in its application to interbranch conflict. Part IV concludes by briefly addressing the broader issue of whether the constitutional law of separation of powers should be altered to deal with the current political dysfunction.

One point before proceeding: Pozen, of course, recognizes that introducing the self-help justification into the law of separation of powers will create the danger of an undue expansion in presidential power.²⁶ But he also contends that notions of self-help are already at play in interbranch relations and that bringing the law of self-help explicitly to the fore would not so much change existing interbranch behavior as it would provide legal structure for an existing dynamic.²⁷ As such, presumably, the acknowledgment of the role of self-help in separation of powers would not necessarily create new risks of presidential aggrandizement; it would only make more explicit the hazards that already exist.

If this is indeed Pozen's argument, however, then it both overstates the role that an inchoate regime of self-help currently plays in separation of powers and understates the effects that would accrue if the availability of the self-help remedy were formally recognized. Certainly, Pozen may be correct as a descriptive matter that, at times, a frustrated President or Congress may believe that the purported malfeasance of the other justifies an extraordinary response. But he is incorrect to the extent that he suggests this belief has become an accepted legal justification for an extraordinary exertion of power. Consider the

25. Pozen, *supra* note 16, at 41-42, 76. Congressional obstruction is not the only type of purported congressional wrongdoing that would justify a President's self-help response under Pozen's theory, but the efforts of some Republicans in Congress to obstruct President Obama's agenda are the central examples that he uses in setting forth the predicates for his thesis. *Id.* at 4-5.

26. *Id.* at 84 (noting the concern that self-help might facilitate "presidential power grabs" or lead to "greater presidential adventurism").

27. *Id.* at 84-85; *see also id.* at 10 ("By allowing us to interpret interbranch conflict in more law-like terms, a self-help perspective allows us to subject it to closer theoretical and institutional scrutiny.").

illustrations raised by Pozen as examples where the use of self-help by the President might have been justified: President Obama's uses of his recess appointment power and selective enforcement authority in response to Congressional intransigence. In none of those instances did President Obama assert that his actions were legal as a result of congressional obstruction. Instead, he claimed his actions were within the formal bounds of his authority.²⁸ Even more to the point, neither the Office of Legal Counsel (OLC) nor the Solicitor General (SG), as Pozen acknowledges, have ever even argued that a President's actions can be defended on the basis of self-help or any similar doctrine²⁹ (although both offices are not exactly known for being shy about asserting executive branch prerogative). The *Self-Help* thesis then is not the recognized law of the land and, if accepted, would move the law of interbranch relations onto new ground.

That new ground, moreover, is likely to prove particularly fertile for presidential power expansion.³⁰ As the law now stands, a President is at least inhibited from taking otherwise impermissible action because of the precariousness of acting outside the formal constitutional bounds of her authority without legal justification. The recognition of a right of self-help, however, would provide the President with a direct license to proceed. And, as discussed in Part II below, this is a license that the President will be tempted to use early and often.

-
28. See Press Release, White House, Remarks by President Barack Obama on Immigration (June 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<http://perma.cc/C8MB-2F2W>] (describing the Dreamers' initiative as an exercise in prosecutorial discretion); Memorandum from Sec'y of Homeland Sec. Janet Napolitano on Exercising Prosecutorial Discretion (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/Q3XS-LKTM>] (same); see also Press Briefing by Press Sec'y Jay Carney (Jan. 5, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/05/press-briefing-press-secretary-jay-carney-152012> [<http://perma.cc/67JL-9UJM>] (asserting that the President's recess appointments were within his traditional authority).
29. Pozen, *supra* note 16, at 78-79. The closest the Solicitor General's Office has ever come to asserting something like the power of self-help occurred in the oral argument in *Noel Canning*. See Transcript of Oral Argument at 21, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281) (Solicitor General Verrilli arguing "I think the recess power may now act as a safety valve given [congressional] intransigence"). This line of argument, however, was immediately rejected by Justice Ginsburg and not further pursued by the Solicitor General. *Id.*
30. Pozen, *supra* note 16, at 84 (noting the concern that self-help might facilitate "presidential power grabs" or lead to "greater presidential adventurism").

I. CONGRESSIONAL OBSTRUCTION AS A CONSTITUTIONAL WRONG

Whether the President should have the power of self-help to overcome unconstitutional congressional obstructionism obviously depends in part on whether congressional obstructionism is actually a constitutional wrong. Pozen's *Self-Help* suggests that it is, or at least that it can be, because it arguably violates interbranch constitutional conventions.³¹ The assertion that congressional obstruction actually transgresses constitutional norms, however, is questionable.

To begin with, congressional obstruction has been around for as long as there has been a Congress.³² From the first congressional session in 1789, members have used dilatory tactics to fight presidential actions that they opposed.³³ To be sure, the current efforts of some in the Republican congressional caucus to thwart President Obama arguably have taken opposition tactics to an extreme—at least with respect to the breadth of the blockade of the President's agenda. Many Republicans seem quite seriously committed not only to opposing the President's policies, but also to doing all they can, in the words of one prominent conservative commentator, to make sure that his presidency fails.³⁴

Nevertheless, even this sort of “maximalist obstructionism”³⁵ is not so easily characterized as outside the bounds of permissible congressional behavior. Rather, congressional prerogative to block executive action is an

-
31. See *id.* at 78 (referring to obstruction as a small-C constitutional violation). At times, however, Pozen seems to go even further, suggesting that obstruction can amount to a large-C (formal) constitutional violation in certain circumstances. *Id.* at 79 (indicating President Obama could claim that obstruction constitutes a large-C constitutional violation).
32. E.g., JOHN J. PATRICK ET AL., *THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT* 240 (5th ed. 2002) (“Even in the 1st Congress, minority members delivered long speeches and used the rules to obstruct legislation they opposed.”); see also *infra* notes 41–50 and accompanying text.
33. The reasons for such tactics were often petty. For example, on August 5, 1789, Senator James Gunn successfully thwarted one of President Washington's first appointments because he wanted one of his own political allies placed in the job. RICHARD A. BAKER, 200 NOTABLE DAYS: SENATE STORIES, 1787 TO 2002, at 12 (2006) (“[U]ntil the early 1930s, senators occasionally derailed nominations for positions wholly within their states simply by proclaiming them ‘personally obnoxious.’”).
34. Rush Limbaugh, *I Hope Obama Fails*, *THE RUSH LIMBAUGH SHOW* (Jan. 16, 2009), http://www.rushlimbaugh.com/daily/2009/01/16/limbaugh_i_hope_obama_fails [<http://perma.cc/UQT7-TVJG>] (“I got a request here from a major American print publication[] . . . to write 400 words on [my] hope for the Obama presidency. . . . I don't need 400 words, I need four: I hope he fails.”) (internal quotation marks omitted).
35. Pozen, *supra* note 16, at 7.

essential component of the constitutional design. Although Pozen suggests, with some support,³⁶ that the Framers believed that separation of powers would promote governmental efficiency,³⁷ their more central concern was with facilitating the ability of one branch to impede the other rather than with promoting interbranch cooperation.³⁸ As Justice Brandeis famously noted, the Framers sought an arrangement “not to promote efficiency but to preclude the exercise of arbitrary power.”³⁹ And as the Court recently reaffirmed in *Noel Canning*, “[The Constitution] is not designed to overcome serious institutional friction [F]riction between the branches is an inevitable consequence of our constitutional structure.”⁴⁰

Second, the conclusion that obstruction is a constitutional wrong is not supported by history. As referenced previously, congressional efforts to obstruct Presidents have been common occurrences throughout our nation’s history.⁴¹ Filibusters or similar tactics have been used by Senate minorities to oppose majority actions since the beginning of the Republic.⁴² Presidents Herbert Hoover,⁴³ Franklin Roosevelt,⁴⁴ and Harry Truman⁴⁵ faced notably

36. See *id.* at 75 n.329 and authorities cited therein.

37. The Framers did indeed believe that separating the executive and legislative functions would make government more “energetic and responsible,” Pozen, *supra* note 16, at 75, but to the extent that this can be characterized as a belief in greater efficacy, it is in the “non-technical sense of efficacy[, in which] an institution is efficient, or efficacious, in as far as it secures the goals set for it to achieve.” N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59, 66 (2001).

38. See also THE FEDERALIST NO. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[When] every institution [is] calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period[, it i]s much more likely to do good than harm The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.”).

39. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

40. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014) (citing *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting)).

41. See, e.g., *supra* notes 25-26; see also Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1160-61 (2014) (arguing that governmental dysfunction is the norm during “constitutional transition, [the] slow and often frustrating movement from an older constitutional regime to a new one”).

42. *Filibuster*, in CONGRESS A TO Z 223, 224 (Charles McCutcheon ed., 6th ed. 2014) (“Delaying tactics were first used in the Senate in 1789 by opponents of a bill to locate the nation’s capital on the Susquehanna River.”); see also Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 187 (1997) (“[T]he strategic use of delay in debate is as old as the Senate itself.”).

43. Megan McArdle, *Unprecedented Congressional Obstructionism Is Actually Quite Precedented*, ATLANTIC MONTHLY (Oct. 11, 2011, 3:50 PM), <http://www.theatlantic.com/business/archive/2011/10/unprecedented-congressional-obstructionism-is-actually-quite-precedented/246513>

obstructionist Congresses during the middle of the last century.⁴⁶ More recently, congressional Democrats did all they could to block the efforts of President George W. Bush to privatize Social Security, although that proposal was a central part of his agenda.⁴⁷ Similarly Democratic Senator Paul Wellstone, before he died prematurely in a plane crash, endeavored to use every congressional procedure possible to prevent the United States from going to war in Iraq.⁴⁸ The constitutional convention regarding congressional obstruction, if there is one, may actually be that doing all that one can to prevent the enactment of measures that one opposes is a central part of American politics.

Third, it is not even clear that the extreme position of acting (or refusing to act) to deliberately cause a presidency to fail is constitutionally inappropriate.⁴⁹ To begin with, such extreme action is not completely unprecedented. The congressional opponents of President Martin Van Buren, for example, were dedicated to ensuring that his presidency was short-lived.⁵⁰ Congressional intransigence did not begin with the election of President Obama.

[<http://perma.cc/6SCL-7MTT>] (noting congressional Democrats did not move President Hoover's agenda because they knew inaction would benefit their party in the next election).

44. *Id.* (noting President Roosevelt faced an obstructionist Congress in his promulgation of the New Deal); *see also* William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 166 (2001).
45. *Id.* (noting President Truman's denunciation of the Congress that blocked his agenda as a "do-nothing Congress").
46. Obstruction for political gain was also a part of nineteenth-century politics. *See infra* note 50 and accompanying text (discussing congressional efforts to cause President Van Buren's Administration to fail).
47. President Bush announced his plan to reform Social Security during his 2005 State of the Union Address. Senate Democrats, anticipating the announcement, sounded the reform's death knell after a caucus meeting *the day before*. Richard W. Stevenson, *Social Security to Be Focus of Much of Bush's Address*, N.Y. TIMES, Feb. 2, 2005, <http://www.nytimes.com/2005/02/02/politics/02bush.html> [<http://perma.cc/Z4RD-YMG8>] (quoting then-Minority Leader Harry Reid as telling reporters that "President Bush should forget about privatizing Social Security," because "[i]t will not happen. The sooner he comes to that realization, the better off we are.>").
48. *See, e.g.*, Paul Wellstone, Senate Floor Speech on the Iraq War (Oct. 3, 2002), *in* WELLSTONE: THE CONSCIENCE OF THE SENATE 189 (Mark R. Ireland ed., 2008).
49. *See, e.g.*, McConnell, *supra* note 1, at 381 ("No dishonor is found in opposing measures a representative and his constituents believe will harm the country."). For an interesting discussion on the normative value of committee-based congressional obstructionism, *see* Keith Krehbiel, *Obstruction and Representativeness in Legislatures*, AM. J. POL. SCI. 643, 657 ("Obstruction, like most other common legislative strategies, is neither good nor bad without exception, but rather is a form of behavior whose normative consequences depend on the situation in which it occurs.>").
50. *See* MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 7 (2013) (documenting the efforts of the Whig Party to derail Van Buren's

Fourth, the obduracy of the congressional Republicans may simply be a sign of the times.⁵¹ We now live in an era of the so-called permanent campaign; each side sees itself in constant electoral war with the other.⁵² To the opposition party, a successful administration can often lead to the victory of the President's party in the next election cycle and, in fact, presidential actions are commonly taken with the next election in mind.⁵³ Accordingly, from a purely political perspective, if not from a good government stance, the strategy of doggedly blocking the President at every turn is completely understandable. Arguably, then, Congress may not be acting wrongly even under an understanding that posits unwritten norms can set rules of interbranch behavior.⁵⁴ The current political norm has become simply one of incessant partisan warfare.⁵⁵

Finally, the contention that Congress acts outside its bounds when it thwarts the executive seems particularly weak in the context of legislation.⁵⁶ The Constitution, after all, places the primary role in promulgating legislation with the Congress;⁵⁷ the role of the President, by contrast, is merely to recommend legislation.⁵⁸ The contention that Congress obstructs (or can

presidency); *see also* TED WIDMER, MARTIN VAN BUREN 88-89 (Arthur M. Schlesinger, Jr. ed., 2005) (same).

51. *See, e.g.*, Balkin, *supra* note 41, at 1171-77; Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 *DRAKE L. REV.* 989, 1013-20 (2013) (suggesting congressional gridlock may be temporary); *cf.* R. Shep Melnick, *The Conventional Misdiagnosis: Why "Gridlock" Is Not Our Central Problem and Constitutional Revision Is Not the Solution*, 94 *B.U. L. REV.* 767, 774-75 (2014) (claiming that accusations of dysfunction are exaggerated).
52. *See* SIDNEY BLUMENTHAL, *THE PERMANENT CAMPAIGN: INSIDE THE WORLD OF ELITE POLITICAL OPERATIVES* 7 (1980).
53. BRENDAN J. DOHERTY, *THE RISE OF THE PRESIDENT'S PERMANENT CAMPAIGN* 6 (2012) (arguing that Presidents increasingly act with an eye to the next election).
54. The "norm" of incessant partisan warfare would not be a "convention" as that latter term is used by Pozen. Convention, in Pozen's terms, refers to an unwritten rule that regulates interbranch behavior rather than a term that merely describes what has become a common course of practice. Pozen, *supra* note 16, at 8. Presumably a hostile Congress would not violate a constitutional convention if it chose not to obstruct a President's agenda—although its behavior might be seen as in variance with current political norms.
55. Pildes, *supra* note 1, at 276-81.
56. There may be a better argument that the Senate is acting wrongly when it refuses to allow up or down votes on a President's nominees in order to frustrate her agenda. The confirmation authority arguably imposes an obligation to act. The legislative power does not.
57. U.S. CONST. art I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").
58. *Id.* art II, § 3 ("[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .").

obstruct) a President when it blocks her legislative agenda is therefore arguably misplaced because Congress is the key movant in the legislative process.⁵⁹

II. SELF-HELP AND THE POWER OF THE PRESIDENCY

The major problem with the self-help thesis, however, is less the claim that congressional obstruction should be considered a constitutional wrong than the suggestion that the President's acting extra-legally should be deemed a constitutional right. Even if congressional obstruction can be fairly characterized as a violation of constitutional conventions in some circumstances, the dangers of granting the tool of self-help to the President to respond to those infractions outweigh any possible benefits. Part II.A demonstrates why—even though Pozen's thesis allows any aggrieved branch to use the weapon of self-help—the primary beneficiary of the remedy is likely to be the President. Part II.B shows why placing that weapon in the hands of the executive is so perilous.

A. Why the Self-Help Remedy Will Primarily Empower the President

Under Pozen's thesis, the self-help remedy is nominally available to both Congress and the executive, but the likelihood is that it will primarily benefit the latter. To begin with, as Pozen notes,⁶⁰ the President will be consistently favored in her ability to take extra-legal measures because she will be unencumbered by collective action concerns.⁶¹ Unlike the Congress, the President can act unilaterally, and, unlike the Congress, the executive branch is

59. An argument could, of course, be made that constitutional norms have changed and that despite the formalities of Article I, the President, rather than the Congress, has become the key mover in the legislative process. Cf. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 26, 63 (4th ed. 1998) (stating that the President “may be the country's chief law-initiator” and “the dominant influence on the national legislative process”). The question of whether it is the Congress or the President that should be the primary actor in the legislative process under the Constitution is beyond the scope of this essay.

60. Pozen, *supra* note 16, at 31-34.

61. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2606 (2014) (Scalia, J., concurring) (“[W]hen the President wants to assert a power and establish a precedent, he faces neither the collective-action problems nor the procedural inertia inherent in the legislative process.”); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 443 (2012) (identifying the “fundamental imbalance” that arises from Presidents having the will and capacity to promote the power of their institution, while individual legislators cannot be expected to promote the power of Congress in any coherent, forceful way (quoting Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 145 (1999))).

not divided along partisan lines.⁶² Additionally, unlike the Congress, the President can act quickly and seize the moment when taking a particular action is most politically expeditious. By timing her actions effectively,⁶³ she can minimize any political blowback that might otherwise accrue in a way that Congress—with its cumbersome procedures—cannot. Further, compared to Congress, the President is likely to be under-deterred in taking such measures because, outside of political objections, the responses of the other branches to her actions will be limited. Many of the President's actions are unlikely to be reviewable by the courts because individual litigants will have difficulty demonstrating the particularized harm necessary for Article III standing,⁶⁴ and after *Raines v. Byrd*,⁶⁵ it is unlikely that the Senate, the House of Representatives, or individual members of Congress will have standing either. Congress, meanwhile, will be hampered in its responses to a President's use of self-help because of collective action problems.⁶⁶

Congress, moreover, will be far less able to use self-help to take actions that violate large-C (or formal) constitutional constraints⁶⁷ for the simple reason

62. “In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch.” *Noel Canning*, 134 S. Ct. at 2605 (Scalia, J., concurring) (citing Bradley & Morrison, *supra* note 53, at 439-47); *see also id.* (“All Presidents have a high interest in expanding the powers of their office, since the more power the President can wield, the more effectively he can implement his political agenda; whereas individual Senators may have little interest in opposing Presidential encroachment on legislative prerogatives, especially when the encroacher is a President who is the leader of their own party.”).
63. The President may also use her unique access to the bully pulpit. *See generally* Maryann Cusimano Love, *The New Bully Pulpit: Global Media and Foreign Policy*, in *MEDIA POWER, MEDIA POLITICS* 257, 258 (Mark J. Rozell & Jeremy D. Mayer eds., 2d ed. 2008) (discussing the evolution of the presidential “bully pulpit” since the term was first coined by President Teddy Roosevelt).
64. *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 *TEX. L. REV.* 781, 786 (2013) (noting that any efforts to challenge the legality of President Obama’s selective enforcement of the immigration laws are likely to be non-justiciable). *But see Noel Canning*, 134 S. Ct. 2550 (finding justiciability and invalidating President Obama’s effort to use his recess appointment powers to circumvent the efforts of some congressional Republicans to prevent certain nominees from receiving confirmation votes). House Speaker John Boehner has recently announced plans to sue President Obama for alleged overreaching. Davis, *supra* note 12. It remains to be seen whether that action will survive a motion to dismiss based on justiciability.
65. 521 U.S. 811 (1997).
66. *See supra* notes 53-54 and accompanying text.
67. As Pozen explains, a large-C constitutional violation is one that transgresses formal constitutional requirements, while a small-c violation is one that infringes constitutional conventions. *See Pozen, supra* note 16, at 49.

that it is unclear what effective extra-legal large-C measures Congress could undertake. After all, obstructing a President's agenda by not moving legislation or by refusing to confirm nominees is not a violation of large-C constitutional requirements even if, as Pozen asserts,⁶⁸ such actions can or do violate constitutional conventions. There are no formal constitutional constraints on Congress's refusal to pass laws or confirm appointees. So exactly what extra-legal large-C actions are available to the Congress? Perhaps Congress could claim that its self-help powers should enable it to pass otherwise unconstitutional laws constraining the President's authority in response to a presidential transgression, but the President, of course, would have the power to veto such legislation or seek to avoid its impact through signing statements. Similarly, Congress could attempt to use its contempt powers against the President or her subordinates in a manner that would otherwise be outside its investigation authority, but that action is likely to be futile on the simple grounds that the executive is needed to enforce contempt measures.⁶⁹

To be sure, Congress will still have access to some self-help remedies in the form of its ability to breach any constitutional conventions otherwise constraining its actions. But self-help will vest the President with both that power *and* with meaningful access to extra-legal large-C measures. The extra-legal self-help option, in short, adds an immensely powerful weapon to the President's arsenal but comparatively little to the powers of the Congress. It therefore exacerbates the power differential that already exists between the two branches.

In addition, Presidents will likely be particularly aggressive in their use of the self-help power. To begin with, Presidents tend to be forceful in using their authority because of the public expectations that are placed on their performance.⁷⁰ The public generally expects the President to act, and her

68. *Id.* at 27-32 (arguing that President Obama, in resorting to unilateral executive action, is employing conditional self-help in response to congressional Republicans' violating the convention of "cooperation and constraint").

69. The Justice Department, for example, recently refused to prosecute Attorney General Eric Holder pursuant to the House's vote in 2012 to hold him in contempt of Congress for failing to provide information over which President Obama had asserted executive privilege. *Justice Department Will Not Prosecute Holder*, N.Y. TIMES, June 30, 2012, <http://www.nytimes.com/2012/06/30/us/politics/justice-department-will-not-prosecute-holder.html> [<http://perma.cc/QAH9-5VXX>]. Actually, the scope of Congress's powers to investigate the President is so broad that it is hard to imagine how Congress could ever exceed any large-C limitations on its investigatory authority. See generally William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781. Congress, of course, could attempt to impeach a wayward President, but that remedy is not extra-legal. U.S. CONST. art I, § 2, cl. 5.

70. See Bradley & Morrison, *supra* note 61, at 442-43 (discussing public expectations that Presidents take the lead in addressing a wide range of domestic and international problems,

inability to do so is often viewed as failure.⁷¹ Furthermore, Presidents, after they take office, tend to view their agenda as the nation's agenda. They are therefore inclined to view efforts to thwart their agenda as impermissible forms of obstruction that threaten the national interest, justifying retaliation.⁷² Third, the availability of self-help would place pressure on an administration to use the remedy even when it otherwise might be reluctant to do so. Saying “no” to one's constituencies becomes more difficult politically when one no longer has the excuse that an action is constitutionally impermissible.⁷³ Finally, the pressures of legacy will also be in play. Presidents are more commonly judged by what they do than by what they forgo. Given the choice between taking legally uncertain action (of a kind that could be creatively defended as a legitimate use of self-help) or doing nothing, it is difficult to assume that Presidents will commonly pursue the latter option. The siren song enticing the President to make her historical mark is not easily ignored.

B. The Dangers in Awarding the Presidency the Weapon of Self-Help

Given that the benefits of the self-help remedy will primarily accrue to the President, the question becomes whether that augmentation of presidential power is advisable. The answer, it seems to me, is a clear no.⁷⁴ First, as has already been noted, the executive is the most dangerous branch, and its ability to dominate the nation's agenda is unquestioned. Any additions to the President's powers should therefore immediately be deemed suspect.

and highlighting the added incentive these expectations give Presidents to maintain and enhance the authority they think is necessary to succeed).

71. Steven G. Calabresi, *The Era of Big Government Is Over*, 50 STAN. L. REV. 1015, 1040 n.141 (1998) (citing Theodore Lowi's proposition that “the expectations of the masses have grown faster than the capacity of presidential government to meet them”).
72. E.g., Sheryl Gay Stolberg, *Obama to Party: Don't 'Run for the Hills'*, N.Y. TIMES, Jan. 27, 2010, <http://www.nytimes.com/2010/01/28/us/politics/28obama.html> [<http://perma.cc/9JYW-CBQB>].
73. See Julie Hirschfeld Davis, *Behind Closed Doors, Obama Crafts Executive Actions*, N.Y. TIMES Aug. 18, 2014, <http://www.nytimes.com/2014/08/19/us/politics/behind-closed-doors-obama-crafts-executive-actions> [<http://perma.cc/T5VC-X84N>] (noting the increasingly noticeable effect outside groups have had on executive action policymaking during the Obama Administration).
74. Others might disagree. The purported unreasonableness of the concern with amassing too much power in the presidency is noted in ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 187* (2010) (arguing that the President is constrained by a highly educated and politically involved elite, as well as by mass opinion, and that American “tyrannophobia” is “fundamentally irrational”). *But see* THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (“When the legislative and executive powers are united in the same person or body, . . . there can be no liberty.” (quoting CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748))).

Second, the self-help remedy is particularly concerning because it is, by definition, a vehicle that trumps constitutional constraints on presidential power. Congress, theoretically, is supposed to be a bulwark against presidential excesses.⁷⁵ Self-help, however, comes into play precisely when Congress assumes this blocking function. It also potentially allows a strategic President to turn Congress's checking power on its head. Under a regime of self-help, a President can turn congressional efforts to curb her agenda to her advantage by claiming "obstruction" and then circumventing the Congress by the use of self-help. If there is a theory that better undermines a system of checks and balances, I am not sure what it would be.⁷⁶

Third, the nebulousness surrounding whether the use of self-help is justifiable will also add to the President's power. As some presidential scholars have noted, one of the major reasons why presidential power has already grown so exponentially is that the grant of powers to the President in Article II is so open-ended.⁷⁷ This openness allows, and historically has allowed, presidential power to expand when a President asserts that circumstances call for its exercise.⁷⁸ A similar dynamic is likely to occur if Pozen's theory of self-help is recognized because the self-help remedy is also extraordinarily open-ended.⁷⁹ Determining whether a convention still exists (or has ever existed) will often be a contestable issue, giving the party charged with deciding that issue considerable leeway.

Of course, unlike the powers set forth in Article II, the remedy of self-help is theoretically available to both the Congress and the President. But it is the President, for the reasons discussed in Part II.A, who will be in the better position to take advantage of any ambiguities.⁸⁰ That advantage will likely be considerable. After all, as Pozen well recognizes, one of the inherent difficulties in self-help is that the entity charged with determining whether a breach of convention has occurred is the party that is highly motivated to achieve a

75. THE FEDERALIST NO. 51 (James Madison), NO. 73 (Alexander Hamilton).

76. Pozen's response presumably is that a President who takes such a course of action faces the risk of political condemnation. Perhaps—if her actions constitute such an egregious power grab as to be indefensible. But in most circumstances, I would suspect that the blurriness in the contours surrounding the availability and the propriety of the self-help remedy will provide the President with more than enough room to gain legal cover for her actions (particularly because it is the President, as the self-helper, who is able to initially frame, and then take advantage of, any uncertainties in the legal questions involved). See *infra* notes 84-85, 88-91 and accompanying text.

77. See, e.g., Flaherty, *supra* note 23, at 1788-92, 1816-17.

78. Marshall, *supra* note 23, at 510.

79. As Pozen notes, for example, conventions can and do change. Pozen, *supra* note 16, at 23.

80. See notes 52-64 and accompanying text.

certain result.⁸¹ And Presidents, as we have already discussed, will be highly motivated.⁸²

For this reason, even the requirement that the self-helper's actions must be proportional to the alleged infraction may not prove to be much of a limitation because it will be the self-helper (the President) who will decide the question of proportionality. And there is again little reason to assume the President will be dispassionate in deciding this issue, given that she will often have so much at stake.⁸³ Therefore, although Pozen's theory strives to guard against egregious excesses in the President's use of self-help by positing that small-c violations by Congress do not justify large-C reactions,⁸⁴ the efficacy of that limitation is questionable. After all, the lines between large-C and small-c constitutional violations are not always clear, and even when they are, they appear to be changeable.⁸⁵ Presidents, therefore, will have significant ability to capitalize on any ambiguities.⁸⁶

Consider the example that Pozen raises at the outset of his Article—President Obama's unilateral decision to engage in selective enforcement of immigration laws in his Dreamers' initiative in reaction to Republican obstruction of immigration reform. Some would consider the President's selective enforcement action to be a large-C violation (that is, a violation of the Take Care Clause⁸⁷), while the congressional obstruction of immigration reform is at best a small-c infraction if it is any infraction at all.⁸⁸ If so, then President Obama acted improperly in promulgating his Dreamers' initiative, even under the terms of self-help, because he reacted to an arguably small-c

81. "There is ample reason to worry that [self-helpers] will misconstrue the law along the way—not just, or even primarily, on account of bad faith, but on account of motivated cognition . . ." Pozen, *supra* note 16, at 50. *See also* THE FEDERALIST NO. 10, at 79-80 (James Madison) (Clinton Rossiter ed., 1961) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.").

82. *See supra* notes 70-73 and accompanying text.

83. *See supra* notes 70-73 and accompanying text.

84. Pozen, *supra* note 16, at 66.

85. As the Court demonstrated in *Noel Canning*, for example, small-c conventions can become large-C constraints. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (suggesting that over time a historical practice could elevate into a constitutional rule).

86. Pozen himself seems to suggest that the President could claim that some types of congressional obstruction constitute a large-C violation meriting a large-C self-help response. Pozen, *supra* note 16, at 79.

87. Delahunty & Yoo, *supra* note 64, at 784.

88. *See supra* notes 19-22 and accompanying text.

violation with a large-C response. The problem, of course, is that in the world of self-help, it is only the President's characterization of her and Congress's actions that counts in the initial determination of whether self-help is warranted. So if President Obama concludes that congressional obstruction is either a small-c or large-C violation and that his decision to selectively enforce a statute is either a small-c violation or no violation at all, then his judgment will prevail at least in the short run and most likely in the long term as well (because neither the Court—for reasons of justiciability—nor the Congress—for reasons of collective action—will be able to effectively respond). What empowering the President with self-help does, in effect, is to go a long way towards allowing her to unilaterally draw the boundaries of her own power.⁸⁹

Fourth, the availability of self-help empowers the presidency by allowing it to short-circuit the constraints inherent in the political process. The path of building political consensus across institutions and party lines can be hard and immensely frustrating.⁹⁰ The route of claiming that one's opponents are obstreperous is not. When the latter course provides a basis for access to extraordinary powers, it is not difficult to imagine why a President may very quickly give up on the former. Indeed, under a regime of self-help, a strategically motivated President might very well find that her best avenue to achieve a substantive goal is to provoke congressional intransigence so that she, via the remedy of self-help, can achieve a result unfettered by the political compromises that would be necessary if she were to work across party or ideological lines.

89. Pozen suggests that factors other than proportionality, such as the availability of judicial review or the requirement that the President notify the Congress before engaging in any mechanism of self-help, might also serve to constrain the President's use of her self-help powers. He is correct in part. The *Noel Canning* decision will serve to constrain a future President's use of the recess power. But in many other circumstances, a President's purported overreach will never reach a court because of justiciability limitations. See *supra* note 64 and authorities cited therein.

A notice requirement is likely to be even less constraining because, as with proportionality, the President as self-helper decides when and to what extent notice is warranted, and she could potentially adjust such requirements in a manner that meets her agenda. Cf. Eric Schmitt & Charlie Savage, *Bowe Bergdahl, American Soldier, Freed by Taliban in Prisoner Trade*, N.Y. TIMES, May 31, 2014, <http://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html> [<http://perma.cc/5ZCM-6ARF>] (reporting that the President did not inform the Congress before engaging in a prisoner swap, although he was purportedly required to do so by statute).

90. See Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2075 (2013) (“[T]here is no magical, frictionless mechanism for converting public opinion into policy Not only does lawmaking require bicameralism and presentment, but it is also the case that the three actors—House, Senate, and President—have different electoral cycles and different (but cross-cutting) constituencies, making it likely that, at any given time, power will be shared by actors with markedly different agendas.”).

Finally, and perhaps most importantly from the long-term perspective in setting the rules of separation of powers, the types of extraordinary actions initially taken under the rubric of self-help could quickly devolve into routine exercises commonly available to the executive. As *Noel Canning* illustrates, the role of precedent is critical in setting both the legal and political legitimacy of subsequent presidential actions.⁹¹ Each time a President exercises a particular power, that action serves both as a legal justification and as political cover for similar exercises of power by her successor.⁹² What might be justified as an extraordinary use of a self-help remedy by one President can readily become a routine exercise of power by her successors.⁹³

III. JURISPRUDENTIAL CONCERNS

Pozen begins his Article by re-characterizing the narrative of President Obama's use of unilateral power from a narrative in which the President has improperly aggrandized his authority to one in which his actions are best understood as reactions to the excesses of Congress. Referring to the President's aggressive use of his recess appointment power and his decisions to selectively enforce immigration laws and the No Child Left Behind Act, Pozen states:

On one prevalent view, the common thread linking these cases is the disdain they show for constitutional boundaries. The President determines to pursue a legally dubious course of action; he finds executive branch lawyers who will bless his preferred approach; and he forges ahead, heedless of the limits that Congress has placed on him. The episodes, accordingly, "suggest that this president lacks a proper respect for constitutional checks and balances." Abstracting from particulars, they reveal a deep continuity between the Obama

91. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559-61 (2014) (noting that, when interpreting the Recess Appointments Clause, the Court puts "*significant weight upon historical practice*," and that "[l]ong settled and established practice" is an important consideration in clarifying the relationship between Congress and the President, "even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era"); Bradley & Morrison, *supra* note 61, at 412 ("Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers.").

92. See generally MICHAEL J. GERHARDT, *THE FORGOTTEN PRESIDENTS* xiii (2013) (noting how presidential power builds upon itself).

93. See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1100 (2013) (noting that the Obama Administration relied heavily on arguments from precedent to justify the initial deployment of military force in Libya and the continuation of operations beyond the sixty-day limit of the War Powers Resolution).

Administration and its predecessors in the contingent, instrumental approach taken to the law when important political objectives are at stake. . . .

[But] another reading of these cases is available, and it points toward a more nuanced conception of the President's relationship to law. On this alternative account, President Obama responded in measured terms to a profound breakdown of the policy process that had come to jeopardize the integrity of representative government. *Congress* was the constitutional villain.⁹⁴

Many, I am sure, would agree with the retelling. Yet at least two other narratives can be imagined. What if, instead of the hyper-partisan obstructionism now taking place, Congress's actions in thwarting the President's legislative initiatives were based on Congress's conclusion that President Obama had violated a constitutional convention by pushing through the Affordable Care Act (ACA) with no bipartisan support?⁹⁵ Or what if, more broadly, Congress's obstruction was aimed at remedying the breaches in constitutional conventions committed by prior administrations, in an effort to reverse some of the executive's accretions of power and to regain some semblance of balance between the branches? On these retellings, "improper" constitutional obstruction becomes justifiable congressional self-help.

I raise these hypothetical scenarios because they illustrate some of the jurisprudential and definitional problems inherent in the self-help thesis. First, they demonstrate how inextricably steeped in politics any claims of breach of constitutional convention (or justified self-help response) are likely to be. It is not difficult for politicians to assert they are victims of their opponents' overreaching. The tactic is commonplace. (In fact, many Republicans did argue that the Democrats violated a constitutional convention of sorts when they passed the ACA without bipartisan support.⁹⁶). Accordingly, even if the

94. Pozen, *supra* note 16, at 5-6 (footnotes omitted).

95. See Steve Benen, *Shifting the Burden*, WASH. MONTHLY (Dec. 27, 2009, 10:30 AM), http://www.washingtonmonthly.com/archives/individual/2009_12/021646.php [<http://perma.cc/5SLX-UEGT>] (quoting commentator Greg Sargent as saying "[the ACA] is the first major reform in American history to be unanimously opposed by a major party"); *Revisiting the House and Senate Votes on "Obamacare,"* VOTEVIEW (June 25, 2012), <http://voteview.com/blog/?p=530> [<http://perma.cc/7T9R-ZR8Y>] (noting that the lack of bipartisan support for the Affordable Care Act stands in stark contrast to the bipartisan and cross-ideological support that was behind nearly all of the other landmark pieces of legislation passed in the last century).

96. See Brief for Constitutional Jurisprudence et al. as Amici Curiae in Support of Respondents at 6, 22-34, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 484070, at *6, *22-34 (arguing that "[t]he 'presumption of constitutionality' that [the

decision of the legality of a use of self-help could be eventually adjudged by an impartial arbiter rather than left to the discretion of the original self-helper, it would be extraordinarily difficult for that arbiter to develop meaningful standards without immersing itself too far into the “political thicket.”⁹⁷

Second, these hypotheticals show how difficult it will be to determine which side engaged in the triggering action that purportedly justifies the self-help response. At which point in the Congress’s wrestling with President Obama did one side commit a constitutional wrong: when Senator Mitch McConnell first announced he wanted to limit President Obama to one term,⁹⁸ when the Republicans refused to bargain in good faith over the ACA,⁹⁹ when the Democrats passed the ACA without bipartisan support,¹⁰⁰ when the Republicans started stalling President Obama’s appointments,¹⁰¹ when the President used recess appointments to fill vacancies on the NLRB,¹⁰² or when the Senate Democrats changed the Senate rules on filibusters to make it easier to confirm the President’s nominees?¹⁰³ As Pozen himself notes, “[t]here is no

Supreme] Court has traditionally bestowed upon Congressional action is substantially weakened” for the ACA, because it was enacted without bipartisan support).

97. Cf. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (holding that the issue of whether a system of legislative apportionment violated the Guarantee Clause was a “political thicket” and a non-justiciable political question). *But see Baker v. Carr*, 369 U.S. 186 (1962) (finding that legislative apportionment was justiciable under the Equal Protection Clause).
98. See Harwood, *supra* note 2 (quoting Senate Republican leader Mitch McConnell in an interview with *National Journal* as saying, “the single most important thing we want to achieve is for President Obama to be a one-term president”).
99. See Michael D. Shear, *Republicans May Opt Out of Obama’s Health-Care Summit*, WASH. POST, Feb. 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/08/AR2010020804202.html> [<http://perma.cc/L8JU-S98K>] (“Leading House Republicans raised the prospect Monday night that they may decline to participate in President Obama’s proposed health-care summit if the White House chooses not to scrap the existing reform bills and start over.”).
100. See Greg Hitt & Janet Adamy, *House Passes Historic Health Bill*, WALL ST. J., Mar. 22, 2010, <http://online.wsj.com/news/articles/SB10001424052748703775504575135440191025592.html> [<http://perma.cc/82VH-9SSE>] (noting that the House voted 219 to 212 to approve the measure, with every Republican voting no).
101. See *For the Record—Obama to U.S. Senate: Stop Blocking My Judicial Nominees*, CHARLOTTE OBSERVER, Oct. 3, 2010, at 22A (quoting President Obama’s complaints about the slow pace of judicial confirmations, including his statement that the blocking of his nominations is “a dramatic shift from past practice that could cause a crisis in the judiciary”).
102. See Melanie Trotman & Brody Mullins, *Tensions Flare After Recess Maneuver: Obama Bypasses Senate on 15 Stalled Appointments, Drawing Fierce GOP Criticism*, WALL ST. J., Mar. 29, 2010, <http://online.wsj.com/news/articles/SB20001424052702304325404575148332890329718.html> [<http://perma.cc/SGV8-Y27R>] (discussing President Obama’s decision to use recess appointments to “circumvent the Senate” and the ensuing congressional fallout).
103. See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES, Nov. 21, 2013, <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps>

value-neutral baseline from which to assess competing charges of constitutional aggrandizement or abdication.”¹⁰⁴

Third, these examples reveal some of the ambiguities (and potential limitlessness) of the self-help claim. Is it for use only by an administration or Congress that has itself been the victim of another branch’s alleged wrongdoing? Or does it protect the executive or the Congress more broadly so that each body can use the remedy to redress infractions against their institutions initiated by previous actors? If so, would it be legitimate for Congress to take extra-legal steps of some sort to curtail the executive’s war powers during the Obama Administration in response to the aggressive use of those powers by the George W. Bush Administration and by previous administrations? Similarly, would it be legitimate for the Obama Administration to aggressively use its recess appointment powers, claiming that its actions were justified as self-help in response to Congress’s acting improperly when some of its Democratic members used filibusters to block President Bush’s nominees? Is the self-help remedy, in short, designed to protect institutions against separation of powers transgressions, or is it more individual in the sense that it is meant to protect those particular Congresses and Presidents who can claim that they were improperly aggrieved by the other’s actions? Logically, it would seem the remedy should be available for both if its purpose is to correct for institutional wrongdoing.¹⁰⁵ But the problem in viewing self-help in this manner is that it invites both the Congress and the President to take extra-legal actions to correct for infractions going back to the beginning of the federal government. Interbranch grievances are not difficult to find in American history.

Finally, and relatedly, these examples illustrate how the ambiguities inherent in the self-help claim can lead to endless cycles of actions and counter-actions coupled with recriminations and counter-recriminations. True, some of this back-and-forth goes on now with each side blaming the other as the cause of the interbranch crisis *du jour*. But whereas now any excesses by one of the branches can be condemned as illegal overreaching, the self-help thesis serves simply as an invitation for more of the same.

-to-limit-use-of-filibuster.html [http://perma.cc/RH9V-BN8Z] (reporting that the Senate approved “the most fundamental alteration of its rules in more than a generation” when it ended the minority party’s ability to filibuster most presidential nominees).

104. Pozen, *supra* note 16, at 44 (citing Mark Tushnet, *1937 Redux? Reflections on Constitutional Development and Political Structures*, 14 U. PA. J. CONST. L. 1103, 1109 (2012); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 524 n.4 (2004)).

105. Pozen does not expressly discuss whether self-help would be available as a remedy against breaches of constitutional conventions by previous administrations or Congresses, but his Article invites the reader to “push the [self-help] inquiry further.” Pozen, *supra* note 16, at 86. This hypothetical does so.

IV. A SEPARATION OF POWERS FOR ALL SEASONS

Without question, *Self-Help* offers an immensely creative legal solution to some of the gridlock that has currently enveloped the federal government. However, the merits of Pozen's approach need to be evaluated for times when the political dynamics may be far different than they are today. Certainly, the current political climate is poisonous, and any notion that the warring factions are likely to come together any time soon seems at best naive. But it is equally unrealistic to assume that the current state of affairs is the permanent condition. It will not always be true that we will have a relatively weak President facing a highly motivated and intransigent congressional opposition. There will also likely be times when a President may be enormously powerful, and the only thing standing between her and unfettered executive power are a few "obstructionist" members of a congressional minority.¹⁰⁶ Tailoring the separation of powers model to address the particular problems created by the current dysfunction therefore seems misfocused. It is also especially dangerous when the remedy it offers is one that would trump formal constitutional safeguards.

William P. Marshall is Kenan Professor of Law, University of North Carolina. He would like to thank Stephen Sachs, Richard Myers, and David Rubenstein for their comments on an earlier draft of this essay. He is also indebted to Claire O'Brien and Tyson Leonhardt for their research assistance, and to David Pozen for sharing his work and for graciously commenting on this critique.

Preferred Citation: William P. Marshall, *Warning!: Self-Help and the Presidency*, 124 YALE L.J. F. 95 (2014), <http://yalelawjournal.org/forum/self-help-and-the-presidency>.

¹⁰⁶ This is often true in wartime where, in the words of Mark Tushnet, the President typically enjoys support in the form of a "rally around the flag" effect. Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2678 (2005).